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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-210

BILLIE SHEPARD,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AT CINCINNATI

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITIONER PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ENTERED IN THIS CASE ON AUGUST 1, 1974.

CITATION TO OPINIONS BELOW

Order of the Court of Appeals unreported filed August 1, 1974 (App. A6).

JURISDICTION

The Court of Appeals entered judgment on August 1, 1974.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. Petitioner respectfully contends that the issue presented has not heretofore been passed upon by this Court and represents question addressing itself to important rights and protections of accused persons.

II. Petitioner has not received needed and proper relief from the Courts below.

STATEMENT OF THE CASE AND FACTS

A three-count indictment was filed against petitioner and two other defendants on January 22, 1973, charging in Count One that on or about November 2, 1972 the petitioner and two other defendants unlawfully took by force from another person $2,868.00 belonging to the Bank of Lobelville, Lobelville, Tennessee, in violation of Title 18, U.S.C., §2113(a) and Section 2, the deposits being insured by the Federal Deposit Insurance Corporation. Petitioner was charged in Count Two with unlawfully taking away said money from the Bank of Lobelville, with intent to steal, in violation of Title 18, U.S.C., §2113(b), and Section 2, and in Count Three with having assaulted one John W. Bates by the use of a dangerous weapon during

the course of this robbery, in violation of Title 18, U.S.C., Section 2113(d), and Section 2.

On September 21, 1973, upon motion of the petitioner, a hearing was held before Judge Harry W. Willford in the United States District Court for the Western District of Tennessee, Eastern Division, pursuant to Title 18, U.S.C., Section 4244 to determine the mental competency of the petitioner to stand trial. The hearing consisted of testimony from Dr. Otto Billig, a psychiatrist from Nashville, Tennessee, who examined petitioner. Dr. Billig was agreed to by the Government and the petitioner (App. A14) as a competent expert in the field of psychiatry to analyze petitioner and to testify as to petitioner's competency to stand trial. It was Dr. Billig's conclusion that petitioner suffered from an organic brain disease (App. A9), and on the basis of this testimony the hearing judge submitted an order on October 8, 1973 declaring petitioner incompetent to stand trial. However, the Government moved, and the Court so ordered, that petitioner be committed to the custody of the United States Attorney General at the Medical Center for Federal Prisoners, Springfield, Missouri, pursuant to Title 18, U.S.C., Sections 4244 and 4246, for the purpose of receiving psychiatric treatment and evaluation to determine whether or not petitioner is competent to stand trial, and if he is not so found, to determine whether or not petitioner's mental condition is likely to improve with care and treatment within a reasonable period of time. It was further ordered that said examination be conducted, and a written report filed, within ninety (90) days from the date petitioner is received at the institution, if that is possible. Petitioner made a timely objection to said motion (App. A14).

QUESTIONS PRESENTED

Proposition I

Whether a District Court relinquishes jurisdiction to commit a federal criminal defendant pursuant to 18 U.S.C. 4246, when he determines that such federal criminal defendant is incompetent to stand trial.

Proposition II

Whether it is an abuse of judicial discretion for a District Court to order a criminal defendant to be committed for further evaluation to the Medical Center for Federal Prisoners at Springfield, Missouri, where an expert psychiatrist agreed to by the Government and the defendant has found the defendant incompetent and where the local community (i.e. Nashville, Tennessee) has adequate facilities to accomplish the Court's end.

STATUTES RELIED UPON

Title 18, United States Code:

§4246. Procedure upon finding of mental incompetency.—Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court may commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law. And if the court after hearing as provided in the preceding sections 4244 and 4245 shall determine that the conditions specified in the following section 4247 exist, the commit-

ment shall be governed by section 4248 as herein provided. (Sept. 7, 1949, c. 535, §1, 63 Stat. 687.)

§4244. Mental incompetency after arrest and before trial.—Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for a judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified pyschiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a state of present insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the

judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. (Sept. 7, 1949, c. 535, §1, 63 Stat. 686.)

The Court of Appeals on August 1, 1974, affirmed the Trial Court.

ARGUMENT

A District Court relinquishes jurisdiction to commit a federal prisoner pursuant to 18 U.S.C. §4246, when he determines that such federal prisoner is incompetent to stand trial.

It is an abuse of judicial discretion for a District Court to order a criminal defendant to be committed for further evaluation to the Medical Center for Federal Prisoners at Springfield, Missouri, where an expert psychiatrist agreed to by the Government and the defendant has found the defendant incompetent and where the local community (i.e. Nashville, Tennessee) has adequate facilities to accomplish the Court's end.

The hearing judge declared petitioner to be incompetent to stand trial. The determination was definite and conclusive of the issues of petitioner's ability to stand trial. It is petitioner's contention, therefore, that the Federal Court relinquished its jurisdiction over petitioner to commit him pursuant to 18 U.S.C. §4246, and further that the State of Tennessee is the appropriate government to take jurisdiction over petitioner for possible treatment or committal, but that this Court retained jurisdiction and abused its discretion by sentencing the petitioner to the

Springfield, Missouri Center, rather than allowing him to be examined and treated locally.

Title 18, U.S.C., §4246 provides that a trial court *may* commit any person who was determined to be incompetent to stand trial to the custody of the Attorney General until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law.

The Supreme Court in *Jackson* v. *Indiana*, 406 U.S. 715 (1972) declared that there is a "rule of reasonableness" imposed on §§4244 and 4246. Unless there is a finding of dangerousness, one committted under §4246 can be held only for a "reasonable period of time" necessary to determine whether there is a substantial chance of his attaining the capacity to stand trial in the foreseeable future. If the chances are slight, or if the defendant does not, in fact, improve, then he must be released if he is not already convicted. Id. at 733.

Those federal courts that have considered whether an accused may be incarcerated after having been adjudged incompetent to stand trial are in general agreement. The Fourth Circuit sums up the position: "In the future, furthermore, after incompetency has been adjudged under §4244, we think the trial court should not commit a defendant into custody, pursuant to §4246, unless and until the court shall also have determined that the defendant might, if released, be a public or private danger." *United States* v. *Curry*, 410 F2d 1372, 1374 (4th Cir. 1969). In accord is the Second Circuit, on record in *United States* v. *Klein*, 325 F2d 283 (2d Cir. 1963), where the Court found that a defendant who was incompetent to stand trial and yet was not dangerous to others, should not be committed to federal authorities, but should be left

for private treatment. Similarly, the Tenth Circuit in *Wells* v. *Attorney General*, 201 F2d 556 (10th Cir. 1953) interpreted §4246 as not authorizing the commitment of one who was permanently insane before reaching trial, and must be interpreted to allow incarceration only of temporarily incompetent defendants or else the statute would be liable to attack as unconstitutional. Id. at 560.

The reasoning in *Wells* is significant, for it underlies the necessary interpretation that §4246 may not provide for incarceration for one permanently incompetent. If an accused is committed to the Federal Medical Center, he is incarcerated in a penal institution. *Henry* v. *Ciccone*, 440 F2d 1052 (8th Cir. 1971).

It is intolerable that one who is presumed innocent and is found incompetent to stand trial is incarcerated at the center. The only recognized exception to this, as stated in the cited case, is when the accused is found to be a public or private danger.

At least one District Court outside of these circuits also has entertained this issue. The United States District Court of New Jersey determined that an accused who was declared incompetent to stand trial, but at the same time was not a menace to himself or others, should be released from custody. *United States* v. *Gorobety*, 156 F.Supp. 808 (D. N.J. 1957). That Court declared that this was the intent of Congress in §4246.

The limited circumstances left by the Supreme Court for commitment are nonexistent in this case, due to the fact that appellant has already been adjudged incompetent based on the findings of the District Court Judge and on the uncontroverted testimony of Dr. Billig. In addition, the Court did not find that petitioner was dangerous if left uncommitted to federal authorities. To the contrary,

the uncontested expert opinion of Dr. Billig was that there was no indication that petitioner was dangerous to himself or to society (App. A12). It is important to reiterate that Dr. Billig was the accepted authority on the question of appellant's mental condition by both petitioner and the Government (App. A13), and that the Court recognized the expertise of Dr. Billig's analysis and that his competence could compare favorably with that of any other psychiatrist (App. A13). Indeed, Dr. Billig's eminent qualifications were set out at great length at the commencement of the hearing.

Dr. Billig is a practicing psychiatrist in Nashville, Tennessee. He received his M.D. degree from the University of Vienna in 1937. He was in the Department of Psychiatry at the University of Vienna, Austria from 1937 to 1939; and was at Highland Hospital in Asheville, North Carolina as a resident in neuropsychiatry from 1939 to 1941, and as an associate from 1941 to 1945. From 1945 to 1946, he was Clinical Director of that hospital, and also Director of the Duke Rehabilitation Clinic at the same time. During 1946 through 1947 he was Senior Psychiatrist at Duke University Hospital, and from 1948 to 1960, he was Psychiatrist-in-Chief of the Outpatient Department, Vanderbilt University Hospital. From 1952 to 1961, Dr. Billig was acting Chairman of the Department of Psychiatry at Meharry Medical College in Nashville.

From 1941, Dr. Billig has been active in the practice of his profession, and has a number of academic appointments to his credit. From 1941 to 1943 Dr. Billig was an Instructor in Neuropsychiatry at Duke University; from 1943 to 1946 he was an associate, and from 1946 to 1947, an assistant Professor of Neuropsychiatry at Duke. From 1948 to 1960, he was the Psychiatrist-in-Chief of the Outpatient Department of Vanderbilt University. From 1952

to 1958 he was Associate Professor, and from 1968 to present, Clinical Professor of Psychiatry at Vanderbilt School of Medicine. He is also Professor of Clinical Psychiatry at Meharry Medical College in Nashville.

Dr. Billig is a member of the American Psychiatric Association, World Federation for Mental Health, Society for Projective Techniques, International Society for Psychopathological Expression, Archaeological Institute of America, Royal Society for Health, World Congress of Psychiatry, and others.

Dr. Billig is past president of the Medical Association of Tennessee, and president-elect of the Tennessee Psychiatric Association. He has also lectured in the School of Social Work, University of Tennessee, has been consultant for the Veterans Administration in Murfreesboro, Tennessee, and was President of the American Psychiatric Association.

He is a Diplomat in the Board of Neurology and Psychiatry in 1948; Honorary Fellow of International Society of Psychopathological Expression, and Honorary Fellow of the German-Speaking Society of Psychopathological Expression (App. A7-9).

In addition, he is the author of 35 articles in his field.

Dr. Billig testified that he had examined petitioner, and that petitioner was suffering from organic brain damage (App. A9), that this type of problem is well recognized in the field, and that this sort of condition usually grows worse (App. A11). In addition, Dr. Billig testified that there is no drug or chemotherapy which could improve appellant's brain condition (App. A11), and that petitioner would probably not improve (App. A11).

Dr. Billig's testimony was not challenged by anyone, and no evidence was introduced to indicate that petitioner

might respond to treatment or that he would ever be capable of standing trial. The conclusion of the hearing was that petitioner was not competent to stand trial, and the evidence was uncontroverted that there was no indication that petitioner was dangerous to himself or to society. In light of the legal authority cited earlier, the only permissible alternative is to release petitioner from federal custody and allow the State of Tennessee which does have statutory provision for both criminal commitment before trial, 33 T.C.A. §701, and for voluntary commitment, 33 T.C.A. §§1201-1214.

The third possible reason for confinement of petitioner in federal facilities would be under 18 U.S.C. §4248 if petitioner had been convicted. However, this alternative is also unavailable to the court for the obvious reason that petitioner was neither tried nor convicted, and that trial was precluded by the determination of petitioner's incompetency to stand trial.

In addition to legal reasons why petitioner may not be committed to the Medical Center for Federal Prisoners, there are equitable, social, and medical reasons why petitioner should be either released from custody or bound over to the state for commitment. The Second Circuit, in a decision made even before the Supreme Court handed down its restrictions on commitment under §4246 in *Jackson* v. *Indiana,* considered the balancing of considerations as to whether a defendant who was declared incompetent to stand trial should be sent to the Federal Center in Springfield, as opposed to being allowed to seek private treatment locally. *United States* v. *Klein*, 325 F2d 283 (2d Cir. 1963). That Court recognized that because psychiatric specialists differ as to methods of treatment, that there was competent medical help locally, and that there was no assurance that the Federal Medical Center would

do as good or better a job, the lower court should be reversed as to its committal to the Federal Center. The Court expressed concern for the potentially damaging effect of sending a patient to a "distant and unfamiliar institution" when competent help was available locally. Id. at 286. In addition, the Court indicated the beneficial result of treating appellant's mental condition at home where he may conduct a business and maintain social intercourse, without incarceration.

With respect to Petitioner Shepard, it was ascertained at the hearing that he was suffering from organic brain disease (App. A9), and as a result he is not likely to respond to treatment if he were confined at the Federal Center. The appropriate remedy is to allow petitioner to be released from federal control, and to be turned over to Tennessee authorities. Tennessee provides for both criminal commitment, 33 T.C.A. §701, and for voluntary commitment, 33 T.C.A. §§1201-1214. Whereas treatment is not likely to help, it would be in the best interest of society to allow petitioner to be under local supervision. If he were turned over to the control of Central State Psychiatric Hospital of Tennessee, petitioner would be in his native Nashville, where he could remain in close contact with his friends and relatives, which as *Klein* indicated, is essential to promoting stability.

Kirkwood v. *Harris*, 229 F.Supp. 904 (W.D Mo. 1964), affirmed this position, in holding that a defendant, in light of his permanent mental condition, should be transferred from the Federal Center to an appropriate State or other suitable institution.

It is, therefore, the position of the petitioner that the District Court abused its discretion, if it, in fact, had any, in ordering the petitioner to the Center at Springfield, Missouri. If additional psychological examinations were

desired by the Court, the reasoning of *United States* v. *Klein*, 325 F2d 283 (2d Cir. 1963) should be considered and the petitioner allowed to remain in Nashville and his home and with his family and allowed to be examined by local psychiatrists, rather than being uprooted and sent to the Center at Springfield, Missouri for ninety (90) or more days.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DALE QUILLEN
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Petition for Writ of Certiorari has been mailed to the Solicitor General of the United States, Department of Justice, Washington, D.C. 20530, this 29th day of August, 1974.

DALE QUILLEN
Attorney for Petitioner

APPENDIX

INDICTMENT

(Filed January 1, 1973)

The Grand Jury Charges:

COUNT ONE

On or about November 2, 1972, in the Western District of Tennessee, Eastern Division,

FRED EARNEST PHILLIPS
BILLIE SHEPARD
and
HENRY EDWARD LEMAY

unlawfully, wilfully and with felonious intent, did take, by force and violence and by intimidation from the person and presence of another a certain sum of money in the approximate value of $2868.00, the aforesaid sum of money belonging to and being in the care, custody, control, management and possession of the Bank of Lobelville, Lobelville, Tennessee, the deposits of which were, at the time, insured by the Federal Deposit Insurance Corporation, in Violation of Title 18, United States Code, Section 2113(a), and Section 2.

(nm. $5,000 or nm. 20 yrs, or both)

COUNT TWO

On or about November 2, 1972, in the Western District of Tennessee, Eastern Division,

FRED EARNEST PHILLIPS
BILLIE SHEPARD

and

HENRY EDWARD LEMAY

knowingly, unlawfully and wilfully did take and carry away, with intent to steal and purloin, from the Bank of Lobelville, Lobelville, Tennessee, money in the approximate value of $2868.00, belonging to and in the care, custody, control, management and possession of the aforesaid Bank of Lobelville, the deposits of which were, at the time, insured by the Federal Deposit Insurance Corporation, in violation of Title 18, United States Code, Section 2113(b), and Section 2.

(n.m. $5,000 or nm. 10 yrs., or both)

COUNT THREE

On or about November 2, 1972, in the Western District of Tennessee, Eastern Division.

FRED EARNEST PHILLIPS
BILLIE SHEPARD

and

HENRY EDWARD LEMAY

unlawfully, willfully and with felonious intent, did take, by force and violence, and by intimidation, from the person and presence of another a certain sum of money in the approximate value of $2868.00, the said sum of money belonging to and in the care, custody, control, management

and possession of the Bank of Lobelville, Lobelville, Tennessee, the deposits of which were, at the time, insured by the Federal Deposit Insurance Corporation, and at the time and place alleged, while committing the aforesaid offense,

FRED EARNEST PHILLIPS
BILLIE SHEPARD
and
HENRY EDWARD LEMAY

did assault and put in jeopardy the life of John W. Bates, by the use of a dangerous weapon, that is, a hand-gun, in violation of Title 18, United States Code, Section 2113(d) and Section 2.

(nm. $10,000 or nm. 25 yrs., or both)
A True Bill,

.....
Foreman

DATED: January 22, 1973

.....
United States Attorney

ORDER ON COMPETENCY HEARING

(Filed October 8, 1973)

This cause came on to be heard upon motion of the defendant, Billie Shepard, for psychiatric examination pursuant to Title 18, United States Code, Section 4244.

On September 21, 1973, a hearing was held in open Court, during which testimony was received from Dr. Otto Billig, who previously had furnished to the Court a report of psychiatric evaluation concerning the defendant, Billie Shepard. At the conclusion of said hearing the United States orally moved the Court to have the defendant committed to the Medical Center for Federal Prisoners, Springfield, Missouri, for further psychiatric evaluation. The defendant made a timely objection to said motion.

After fully considering the evidence presented to the Court concerning this matter, statements of counsel, and upon the entire record, the Court finds that the defendant, Billie Shepard, is presently incompetent to stand trial. The Court further finds that the motion of the United States for further psychiatric evaluation is well-taken and should be granted.

Therefore, it is ORDERED that the defendant, Billie Shepard, be committed to the custody of the United States Attorney General at the Medical Center for Federal Prisoners, pursuant to Title 18, United States Code, Section 4244 and 4246.

It is FURTHER ORDERED that during said commitment the defendant, Billie Shepard, receive psychiatric treatment and evaluation to determine whether or not the defendant is competent to stand trial, and, in the event a determination is made that the defendant is not

competent to stand trial, whether or not the defendant's mental condition is likely to improve with care and treatment within a reasonable period of time.

It is FURTHER ORDERED that said examination be conducted within ninety (90) days from the date the defendant is received at the institution; and that the Court be furnished with a written report at the conclusion of said ninety (90) days, unless the Court is advised by officials at the institution that said examination cannot be completed within that time.

It is FURTHER ORDERED that the defendant's attorney obtain and furnish to the United States Attorney any reports of prior psychiatric treatment or evaluation which may be relevant to the examination ordered herein, and that the United States Attorney furnish said reports to the Medical Center.

It is FURTHER ORDERED that the United States Marshal, Nashville, Tennessee, shall transport the defendant, Billie Shepard, to the Medical Center for Federal Prisoners, Springfield, Missouri, and that the defendant shall surrender himself for said transportation when ordered to do so by the Marshal, provided that the defendant shall not be required to report prior to 15 days from the date this Order is entered.

Enter this 8th day of October, 1973.

No. 74-1188

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

BILLIE SHEPARD,
Defendant-Appellant.

ORDER

(Filed August 1, 1974)

Before: WEICK, MILLER and LIVELY, Circuit Judges.

This is an appeal from an order of the district court, entered after a competency hearing, committing the defendant to the Medical Center for Federal Prisoners, pursuant to 18 U.S.C. §§4244 and 4246, for the purpose of further psychiatric examination and evaluation.

The defendant-appellant, Billie Shepard, after being charged with armed robbery, moved for a hearing to determine his mental competency to stand trial. The district court granted the motion and a hearing was held. At the hearing Dr. Otto Billig, a practicing Nashville psychiatrist, testified that in his opinion the defendant was mentally incompetent to stand trial. After fully considering the evidence, the district court found that the defendant was presently incompetent to stand trial but ordered further examination at the Medical Center for Federal Prisoners to determine the prognosis of his mental incompetency. The court's order directed that a new report should be submitted within ninety (90) days.

On appeal, the defendant urges that the court's finding of mental incompetency divested it of jurisdiction under

§4244 and §4246, thus making its order for further examination a nullity. We disagree. The district court's order is consistent with the purposes of §4244 and §4246 and meets the "rule of reasonableness" applied to these sections by the United States Supreme Court in *Jackson* v. *Indiana*, 406 U. S. 715 (1972).

Upon consideration, we deem the defendant's appeal to be without merit.

The order of the district court is hereby affirmed.

Entered by Order of the Court.

/s/ John P. Hehman
Clerk

TRANSCRIPT OF TESTIMONY

[8] DR. OTTO BILLIG,

the said witness, having been first duly sworn, testified as follows:

Mr. Nimmo: If it please the Court, this is Dr. Otto Billig. He is a practicing psychiatrist in Nashville, Tennessee, with offices at 2011 Ashwood Avenue, Nashville. Dr. Billig was born in Vienna, Austria, August 10, 1910. He received his M.D. Degree from the University of Vienna, 1937.

He was in the Department of Psychiatry, at the University in Vienna, Austria, from 1937, to '39; 1939 to '41, he was a Resident in Neuropsychiatry, Highland Hospital, in Asheville, North Carolina; 1941-45, he was Associate, Associate in Neuropsychiatry, Highland Hospital, High Point, North Carolina; 1945-46, he was Clinical Director of that hospital and Director of the Duke Rehabilitation Clinic at the same time.

Nineteen forty-six—forty-seven, Senior Psychiatrist, Duke University Hospital, Durham, North Carolina; 1948 to 1960, he was Psychiatrist-in-Chief, Outpatient Department, in Vanderbilt University Hospital.

[9] The Witness: That is correct.

Mr. Nimmo: Nineteen sixty-two—nineteen sixty-one, he was Acting Chairman of the Department of Psychiatry, Meharry Medical College, Nashville.

From 1941 to the present time, he has also been active in paractice of his profession. He has a number of appointments from 1941 through present. Forty-one to forty-three, Instructor in Neuropsychiatry, Duke University; '43-46, Associate in Neuropsychiatry, Duke University Medical School, Durham, North Carolina.

Forty-six to forty-seven, Assistant Professor of Neuropsychiatry, Duke University; 1948-60, Psychiatrist-in-Chief, Outpatient Department, Vanderbilt University; '52-63, Associate Professor of Psychiatry, Vanderbilt; 1968 to present, Clinical Professor of Psychiatry, Vanderbilt School of Medicine, and also 1952 to present, Professor of Clinical Psychiatry, Meharry Medical College, Nashville, Tennessee.

He is presently a member of numerous professional societies, the American [10] Psychiatric Association, World Federation for Mental Health, Society for Projective Techniques, International Society for Psychopathological Expression, Archaeological Institute of America, Royal Society for Health, World Congress of Psychiatry, and others.

He is past president of the Medical Association of Tennessee, and of the Tennessee Psychiatric Association.

He has also lectured in the School of Social Work, University of Tennessee; has been consultant for Veterans Administration; president of the American Association.

He is a Diplomate in the Board of Neurology and Psychiatry, 1948; Honorary Fellow of International Society

of Psychopathologic Expression; and Honorary Fellow of the German-Speaking Society of Psychopathologic Expression.

He is author of over thirty-five articles in his field.

Direct Examination

By Mr. Nimmo:

Q. Dr. Billig, you have heard the biographical material that I read into the record. Is it true and [11] correct, to the best of your knowledge, information and belief? A. With one exception.

Q. All right, sir. A. And I'm not positive, but I am President-Elect of the Mental Society of Tennessee.

Q. Oh, you are President-Elect to this? A. Yes, sir.

Q. I'm sorry. I thought you were past President.

Dr. Billig, have you had occasion to examine Mr. Billie Shepard? A. I have.

Q. All right, sir.

For what purpose? A. To evaluate his mental condition.

Q. All right, sir.

Both at the time of the alleged incident and through the present time; is that correct? A. Yes, sir.

Q. And what was the date of his first examination? A. March 16, 1973.

Q. Where did you examine him? A. In my office.

Q. All right, sir.

* * *

[15] * * * you arrived at a medical diagnosis of his psychiatric condition? A. I have, a psychiatric diagnosis, and, and this would be he suffers from organic brain disease and this would mean that he is unable to, to think clearly, to organize his thoughts adequately; that

his judgment is greatly reduced; and his emotional feeling is, his emotional expressions are not appropriate. He showed a certain indifference about his situation, about himself; and apparently had lost interest in his activities.

All of those symptoms are quite characteristic of organic brain disease.

Q. All right, sir.

Doctor, you have taught psychiatry for many years, over thirty years, I guess, have you not, or twenty years? A. I'm afraid so; yes, sir.

Q. Is this the type of thing that is well-recognized by the general text writers in the field? A. Very much, very much so, and I have a textbook that has been utilized in teaching widely, utilized in teaching, recognized text, I can quote from the textbook if you desire me to do so.

Q. All right, sir. Is the textbook used in [16] teaching of medical schools? A. That is right.

Q. What is it, just for the purpose of the record, what is the title of the text? A. Modern Clinical Psychiatry, *Norris* and *Cope* (spelling phonetically).

Q. All right, Doctor.

Doctor, you understand, of course, our question here today is concerning Mr. Shepard's ability to stand trial on this matter? A. (Nods head in the affirmative.)

Q. And will not today determine his guilt or innocence based on whether he was or was not insane or was not mentally capable at the time of the crime? A. (Nods head in the affirmative.)

Q. Based on your examination of the defendant, and your training, and diagnosis of the mental illness at the time of the act charged, as of November 2nd, I believe you stated, did this condition exist on November 2nd, in your opinion? A. According to the report, it did exist.

Q. Doctor, does this condition exist today? A. I cannot say about today, because, but I would assume it would exist because conditions of this sort usually progress rather than regress.

[17] Q. Have you ever seen a case where this condition of, that Mr. Shepard has, has regressed or, rather than progress? A. I can't remember every seeing a case like that.

Q. I believe then, if he is going to move, then he will move in a direction of further deterioration, rather than increasing—(interrupted) A. Most likely.

Q. Doctor, is this condition that he has, is it the type of condition that can be treated by drug or chemotherapy? A. I don't think so.

Q. Do you know of any case where it is being treated by drug or chemotherapy? A. Symptomatic treatment, where the patient's malcovalence are depressed but it does not treat the other basic diseases, but is only a symptomatic treatment.

Q. In other words, you can give anybody drugs to come up—(interrupted) A. That is right.

Q. But don't do anything to help his brain reorganize in what he has lost? A. His brain won't, won't improve. It won't [18] improve because of the disease, organic disease. It might improve to a certain degree, but very minimal. There is no basic change.

Q. And as to Mr. Shepard, in particular? A. I would doubt that there would be any basic change.

Q. All right, sir.

Now, based upon your experience, training and your diagnosis of Mr. Shepard, do you have an opinion, based upon a reasonable medical certainty, as to whether or not Mr. Shepard is capable of consulting and advising with counsel in such a manner as to help facilitate his

defense? A. This is a rather complex question. I think Mr. Shepard has difficulties in his memory. He contradicts himself very frequently, without lying. I mean, he cannot help it. This is part of the basic, or basic condition of this condition, I mean, they have memory difficulties, difficulties in organizing their thinking. He is sometimes not clear in his thinking, cannot express himself properly. When he makes a statement he is apt to take the statement back or change it within a few minutes time. So it would be very difficult to give an adequate and reliable account of his actions, and, therefore, it * * *.

* * *

[28] * * * defendant, in that case it was the Federal Government.

Q. All right, sir.

Mr. Reid: I have one thing further, if I could.

The Court: All right, sir.

Recross-Examination

By Mr. Reid:

Q. Dr. Billig, realizing it is your opinion that it is possible that any confinement treatment might *(*not*) do Mr. Shepard any good, is it your opinion that it would not do him any harm? A. I don't think it would do him any harm.

Mr. Reid: All right, sir.

That is all.

The Court: Is there any indication, Dr. Billig, from your examination, that Mr. Shepard was dangerous to himself or to society?

The Witness: Not at this time, except that he may, he might commit other social acts as he apparently did commit or is accused of.

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*(Added by reporter—does not appear in notes.)

The Court: Would that be indicative or is there any way of knowing whether that might be indicative, whether or not he might be in an alocholic state or condition?

* * *

[45] * * * that he has ever been involved with a law violation, but I just don't—potentially I suppose it could be said that he will always be a threat when, might he ever be released, I mean, I'm afraid that from, from what I know about him medically, he may not be living too much longer, but I think he is, physically, he is about as bad off physically as he is mentally, and I'm afraid any commitment might just be, in effect, a life sentence.

The Court: All right, sir.

I share your concern about what is the proper answer in a situation of this kind with regard to a person in the apparent status of Mr. Shepard's.

Mr. Reid, I'll hear from you, sir.

Mr. Reid: If Your Honor please, by making the motion that I made, I didn't mean to, in any way, concede that the United States does not believe that Mr. Shepard is competent to stand trial. However, we did agree with Mr. Quillen to use the services of Dr. Billig, and don't question his expertise at all, and that is the evidence * * *.

* * *

[48] * * * are practicing in Nashville. If the Court, Government, wishes to designate another, or any number of them, he is unemployed. We'll get him down there for any additional study, but we don't see the necessity for having him committed, for taking him away from his home. He still hasn't been convicted of any crime.

The Court: Gentlemen, the Court feels that this is a difficult matter for the Court to determine the proper or just course.

Under the circumstances, counsel for the defendant were entirely correct in filing the motion or suggestion, as they did, with respect to the competency of this defendant to stand trial, and certainly this Court recognizes, based upon the testimony and the evidence of the experience and standing of Dr. Billig, that he could, as well as anyone, give us an expert opinion about what the mental capacity is and abilities of the defendant. At the same time, this Court does believe that on an ongoing present basis, that the Court needs to be fully satisfied with respect to this particular defendant's * * *.

* * *

[54] * * * direct that the United States Attorney, in Nashville, seek or investigate as to whether such proceedings should be instituted, if they are not voluntarily done on his behalf.

Mr. Quillen: All right, sir. Of course, I think the record is clear that this is being done, although the defendant is offering the alternative suggestion that he be— (interrupted)

The Court: Yes, sir.

Mr. Quillen: (Continuing) —examined by any other psychiatrist.

The Court: And for the protection of the defendant, in light of, Mr. Quillen, what you have said, that the Court's order will note the defendant's exception for his being committed for whatever exception is stated, and whatever you agreed to do, will be made, whatever you agreed to.

Mr. Reid, you will submit the order to counsel at least as to form, in the event he has any suggestions or comments with regard to that, before the Court signs it.

Mr. Reid: Yes, sir. Thank you.

Mr. Quillen: Before I forget it, Your * * *.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-210

BILLIE SHEPARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that, having found him "presently incompetent to stand trial," the district court abused its discretion by ordering him temporarily committed for further psychiatric study to determine whether he was competent to stand trial, and, if not, whether his condition was likely to improve within a reasonable time.

Petitioner was charged in a three-count indictment with armed robbery of a federally insured bank, in violation of 18 U.S.C. 2, 2113(a), (b), and (d). During arraignment petitioner moved orally for an examination as to his competence to stand trial. The motion was granted.

At the hearing, Dr. Otto Billig, a psychiatrist, testified that he had examined petitioner during the six months before the hearing and had concluded that petitioner was suffering from an organic brain disease which resulted in his having reduced judgment (Pet. App. A9-A10; Govt. App. 2b[1]). Billig added that petitioner's problem was aggravated by his alcoholism (Govt. App. 7b-8b, 11b). He further stated that he knew of no treatment to improve petitioner's condition and concluded that it would probably get worse (Pet. App. A11-A12; Govt. App. 7b). Dr. Billig concluded that, as a result of petitioner's condition, it would be impossible for petitioner to assist his counsel at trial (Pet. App. A11-A12; Govt. App. 3b).

On cross-examination Billig stated that while he did not regard petitioner as a dangerous individual, petitioner would in all likelihood continue to act in an antisocial manner and that, while confinement in a mental treatment facility would not help petitioner, it also would not do him any harm and might be desirable for society (Pet. App. A12; Govt. App. 8b-9b).

At the conclusion of the competence hearing, the court stated that before making a final ruling as to petitioner's competence, it would partially grant the government's motion to commit petitioner to the custody of the Attorney General at the Medical Center for Federal Prisoners in Springfield, Missouri for further examination, such commitment not to exceed 90 days (Govt. App.

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[1]"Govt. App." designates the government's appendix filed with the court of appeals. A copy of the government's brief and appendix is being lodged with the Clerk of this Court.

11b-16b; Pet. App. A4-A5, A13-A14).[2] An order for such temporary commitment was issued by the court on October 8, 1973 (Pet. App. A4-A5). The court of appeals affirmed the order (Pet. App. A6-A7). Petitioner is at liberty pending the disposition of this petition.

Petitioner contends that having found petitioner incompetent to stand trial the district court could not thereafter order him temporarily committed to the Medical Center for Federal Prisoners, under 18 U.S.C. 4244 and 4246. The court, however, made no definitive ruling regarding competence. It simply made a tentative determination that petitioner was "presently incompetent" and ordered petitioner to be temporarily committed to determine petitioner's competence to stand trial and, if petitioner were found incompetent, whether his condition was likely to improve within a reasonable period of time (Pet. App. A4-A5). At the conclusion of the hearing the court stated as follows (Govt. App. 14b-16b):

> * * * [T]he Court feels that this is a difficult matter for the Court to determine the proper or just course.
>
> Under the circumstances, counsel for the defendant were [sic] entirely correct in filing the motion or suggestion * * * with respect to the competency of this defendant to stand trial, and certainly this Court recognizes, based upon the testimony and the evidence of the experience and standing of Dr. Billig, that he could, as well as anyone, give us an expert opinion about what the mental capacity is and abilities of the defendant. At the same time, this Court

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[2]The government had moved for a commitment of petitioner to the institution to determine whether his condition was likely to improve and whether his condition was such that he would be a danger to society (Govt. App. 11b-12b).

does believe that * * * the Court needs to be fully satisfied with respect to this particular defendant's present and future disposition, with respect to the matters that have existed up to this time. We are confident that Dr. Billig has given us a fair and reasonable appraisal as to the status of [petitioner] * * * [committed] to Springfield for a study and evaluation with respect to * * * his present status and physical, as well as mental condition, with regard to competency of standing trial, and * * * if the Court found that [petitioner] were not competent to stand trial, whether there should be attached a condition, or a court requirement that the United States Attorney or the defendant's attorney take steps to see, to see to some sort of civil commitment, if that is indicated as necessary. It may not be, and it may be that this is a situation where even though a serious crime is involved, that the defendant is not competent, nor his attorney in a position that they can go forward with a trial under the circumstances.[3]

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[3]The cases on which petitioner relies are inapposite. In *Jackson* v. *Indiana,* 406 U.S. 715, a mentally defective deaf mute who could not write or otherwise communicate, charged with two criminal offenses, was indefinitely committed under the relevant Indiana statute without appropriate due process safeguards. This Court specifically stated, however, that one committed under 18 U.S.C. 4244 and 4246 could be held for a "reasonable period of time" necessary to determine whether there was a substantial chance of his attaining the capacity to stand trial in the fore-

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1974.

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seeable future. 406 U.S. at 733, 738. In *United States* v. *Curry*, 410 F. 2d 1372, 1374 (C.A. 4), where the defendant had already been declared incompetent, and had been committed for an indefinite period of time, the court held that the defendant could not be held unless it was determined that his release would constitute a public danger. The court added, however, that "[t]he court may, of course, detain him for a reasonable time to observe and otherwise inquire into his propensities, and also to treat him for his illness in the hope of restoring competency." 410 F. 2d at 1374. That, of course, is exactly what the court ordered here.